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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE OKLAHOMA PUBLISHING COMPANY,
Petitioner,

v.

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED *

1. Whether a member of the press, which was not a party to the underlying action, has standing, representing the public, to challenge a protective order which prevents a governmental entity, as a party to civil litigation involving matters of significant public importance, from revealing to the press or public pretrial discovery documents or discussing information contained in them.

2. Whether a protective order in a case involving expenditures of public funds which is entered and continued on the basis of a conclusory statement that the discovery materials are "confidential," and without any consideration of the First Amendment, satisfies the "good cause" requirement of Fed. R. Civ. P. 26(c).

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* Respondents whose names are not contained in the caption are the Oklahoma Department of Human Services; Comanche County Memorial Hospital; Hillcrest Medical Center; Oklahoma Hospital Founders Association, Inc.; St. Anthony Hospital; and St. John Medical Center, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Oklahoma Publishing Company ("OPUBCO")[1] petitions that a writ of certiorari issue to review the opinion and judgment in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[2] is reported at 748 F.2d 1421 (10th Cir. 1984). The order of the United States District Court for the Western District of Oklahoma is unreported (App. 11a).

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[1] The Oklahoma Publishing Company has the following affiliated or subsidiary companies that are not wholly owned: The Farmer Stockman Publishing Company; Datatek Corporation.

[2] "App." refers to the Appendix to this Petition.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1984. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on January 31, 1985 (App. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the United States Constitution states in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fed. R. Civ. P. 26(c) states in pertinent part:

> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any orders which justice requires to protect a party or person . . . ."

STATEMENT OF THE CASE

By this petition, OPUBCO seeks to protect its right and that of the public to learn of information contained in litigation documents exchanged in a suit settled by a state agency before trial which resulted in the payment of millions of dollars in public funds for Medicaid reimbursement to private entities. OPUBCO, publisher of *The Daily Oklahoman*, an Oklahoma City daily newspaper with the largest paid circulation of any newspaper in the state, has reason to believe that cost reports submitted to the Oklahoma Department of Human Services ("DHS") by four Oklahoma hospitals and used, in part, as a basis for Medicaid reimbursements may have been highly inflated. Only a protective order entered

without the "good cause" required by Fed. R. Civ. P. 26 (c) prevents OPUBCO from verifying this through access to materials produced in civil discovery.

The documents OPUBCO seeks are at the heart of the public controversy initiated by the filing of the underlying action by the Oklahoma Hospital Association and five of its members ("Hospitals"). In 1983, DHS changed the methodology by which it reimburses hospitals for inpatient hospital services provided under the Oklahoma Medical Assistance Program.[3] This change would have reduced reimbursement to the Hospitals by $16 million in comparison to the previous plan. On May 10, 1983, the Hospitals brought an action to enjoin DHS from implementing this new methodology.

Invoking jurisdiction under 28 U.S.C. § 1331, the Hospitals filed suit in the United States District Court for the Northern District of Oklahoma in Tulsa where venue was improper.[4] On May 25, 15 days after the suit was filed, DHS's motion for a change in venue was granted, and the case was transferred to the Western District of Oklahoma and randomly assigned to District Judge Russell. However, with the encouragement of the Hospitals[5] and over DHS's objections, Judge Brett, to whom the case was originally assigned in the Northern District, was reassigned to the case on June 7.

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[3] DHS is authorized to administer the Medical Assistance Program under Okla. Const. art. 25, § 1, and Okla. Stat. tit. 56, § 162.

[4] *See* 28 U.S.C. § 1391(b); *see also* Order (May 25, 1983), at 4, Oklahoma Hospital Association v. Oklahoma Department of Human Services, No. CIV-83-1274-BT (W.D. Okla. filed May 31, 1983) [*OHA v. DHS*] ("Because all the defendants reside in the Western District of Oklahoma and the cause of action arose in the Western District of Oklahoma, the Court concludes venue in this district [Northern] is improper.").

[5] By a letter dated May 27, 1983, the Hospitals advised the Clerk for the Western District that it was "important that the case remain in Judge Brett's Court."

On August 29, DHS moved to disqualify the trial judge under authority of 28 U.S.C. § 445 on the grounds that (1) prior to becoming a judge, Judge Brett had represented St. Francis Hospital, Inc., the largest hospital member of the OHA, in a suit against DHS involving similar issues; (2) Judge Brett had a prior business association with a witness (a St. Francis employee) listed by the Hospitals to appear at the hearing on a preliminary injunction; and (3) Judge Brett would not have been assigned the case had it not been filed in the Northern District where venue was improper.[6]

On September 2, DHS served the Hospitals with a document discovery request under Fed. R. Civ. P. 34 which asked for production of the financial documents which support cost reports submitted by the Hospitals in fiscal years 1980-83. Defendants' First Request for Production of Documents (Sept. 2, 1983), *OHA v. DHS*. The Hospitals offered to produce the requested documents if covered by a protective order. This order would exclude access to all documents for which a privilege was claimed, would prohibit public dissemination of any material produced and provide that all material produced but not introduced in open court would be returned to the originating party or destroyed upon completion of the litigation. The court would rule on privilege disputes after an *in camera* inspection. DHS agreed and sought a similar order for documents it produced. Both protective orders were requested on the sole basis that the documents were "confidential." No "good cause" for request-

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[6] DHS argued that filing in the Northern District was significant because "of the three district judges assigned to the United States District Court for the Northern District of Oklahoma who are regularly assigned cases in that district, . . . two judges . . . represented the hospitals in actions against DHS while they were in private practice, and their former firms still represent these hospitals." Defendant's Motion for Disqualification and Supporting Brief at 5, *OHA v. DHS*.

ing the orders was given by the parties, as required by Fed. R. Civ. P. 26(c).

On September 9, the court signed the protective order offered by the parties concerning the documents produced by the Hospitals.[7] The order did not suggest any additional rationale beyond that provided by the Hospitals. The court noted only that "in order to expedite discovery" the parties were "prepared to agree to production of the documents" and that the "records in question" were of a "confidential nature." Protective Order (Sept. 9, 1983), at 4, *OHA v. DHS.* With few exceptions, the approximately 100,000 discovery documents covered by the Hospitals' order were not reviewed by the court.[8]

On September 22, the district court denied DHS's motion to disqualify. On September 27, DHS sought a certified interlocutory appeal of the trial court's denial of the recusal motion under 28 U.S.C. § 1292(b). This request and a related request to stay the trial were denied on October 5, and the trial was scheduled to begin on October 11. However, trial was delayed after the parties advised the court that serious settlement negotiations had begun.

On November 22, the Hospitals and DHS announced a tentative settlement, under which DHS would reimburse the Hospitals during the next fiscal year at a level approximately $8 million greater than DHS initially pro-

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[7] On September 26, a similar protective order was entered covering the documents to be produced by DHS.

[8] The trial court examined, *in camera,* several documents the Hospitals refused to produce, including the minutes of an Oklahoma Hospital Association Executive Committee meeting held May 2, 1983. The Hospitals' assertion of an attorney-client privilege concerning these documents was upheld. Order (Oct. 4, 1983), *OHA v. DHS.*

posed. The parties proposed that the settlement would be entered into and the case dismissed on December 15, at which time the documents produced during discovery would be destroyed or returned under the terms of the protective order.

OPUBCO's attention was called to the discovery materials when it learned that an investigator who had made a hurried, cursory review of some documents produced by the Hospitals had testified in a deposition that the Hospitals factored into their cost reports such items as "condominiums . . . [and] expensive food items being air freighted in from time to time on a regular basis," "a surfer package for an individual to Waikiki Beach" and "expenditures for what I considered to be unusual foodstuffs . . . ." Deposition of William D. Brown (Sept. 22, 1983), at 58, 59, *OHA v. DHS.* The investigator stated, "I don't understand the connection between country clubs . . . condominiums at resort lakes and running a hospital." *Id.* at 91.[9] When *The Daily Oklahoman* reporters sought additional information, DHS representatives told them that only the September 9 protective order prevented the agency from giving them access to the discovery documents produced by the Hospitals.

Based on the investigator's testimony, OPUBCO asked to appear specially for the limited purpose of urging that the protective orders be vacated.[10] Application of

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[9] OPUBCO did not learn about this testimony earlier because under local rules discovery documents and depositions are not filed with the Clerk "unless on special order of the Court or unless they are attached to a motion, response thereto, or are needed for use in a trial or hearing." W.D. Okla. R. 10(e).

[10] By the time OPUBCO moved to appear specially, it was apparent that the Hospital's discovery documents would not be used in open court and would be destroyed. However, it is clear from the pretrial conference that DHS would have introduced these documents in open court had the case been tried. As DHS counsel stated, "We're going to show which expenses are not necessary

OPUBCO to Appear Specially and Applicant's Motion to Vacate Protective Order (Dec. 12, 1983), *OHA v. DHS*. OPUBCO asserted that the orders were not valid under Fed. R. Civ. P. 26(c) absent a showing of "good cause," and that preventing public access to evidence of possible misallocation of public funds contravened the First Amendment.

DHS neither supported nor opposed OPUBCO's motion. Response to [sic] Defendants Oklahoma Department of Human Services and Robert Fulton to The Oklahoma Publishing Company's Application to Appear Specially and Motion to Vacate Protective Orders (Jan. 5, 1984), *OHA v. DHS*. Indeed, DHS stated that it immediately would make available to OPUBCO all documents it had produced during discovery. Transcript of Hearing on Motion to Vacate Protective Orders (Jan. 11, 1984), at 38-39, *OHA v. DHS* [Hearing Transcript].

On January 27, 1984, the district court, while recognizing OPUBCO's standing to move to vacate the orders, denied OPUBCO's motion. Despite acknowledging that "some of the materials sought may be a matter of public interest as the lawsuit involved the expenditure of large sums of public funds," the court found that the parties had stipulated to the orders and had a right not to reveal information if they so chose. Order (Jan. 27, 1984), *OHA v. DHS* (App. 14a).

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for an economic and efficient hospital. These [are the] documents underlying the Medicare cost reports that DHS officials relied upon in performing Medicaid methodology that's in dispute in this case. Most of these will be presented in summary form." Pretrial Conference Transcript (Sept. 27, 1983), at 8, *OHA v. DHS*. During the same conference, the court paraphrased the DHS position by saying, "We've got approximately 20 areas of expenses that were unnecessary to the Medicaid costs of an efficiently and economically run hospital. And those 20 are broken down into further more expenses areas and the entire 20 may have 50- to 60,000 documents behind them." *Id.* at 31-2.

OPUBCO appealed the district court's decision to the Tenth Circuit, invoking its jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit affirmed based solely on its determination that OPUBCO lacked standing to challenge the protective orders. The court relied on the test set forth in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The court acknowledged that since OPUBCO had alleged "that were it not for the protective orders, the parties would be free to disseminate, and it would thereby be free to gather and publish, discovery documents not subject to those orders," OPUBCO met the "injury in fact" prong of the *Valley Forge* test. *Oklahoma Hospital Association v. Oklahoma Publishing Company*, 748 F.2d 1421, 1424 (10th Cir. 1984) (App. 6a).

However, the panel found that OPUBCO did not satisfy the second part of the test, *i.e.*, "whether OPUBCO's alleged injury 'fairly can be traced to the alleged action' and 'is likely to be redressed by a favorable decision.'" *Id.* (quoting *Valley Forge*, 454 U.S. at 472). Despite having alluded to OPUBCO's representation that only the continued existence of the protective order prevented access to the documents, and despite submission to the court of an affidavit from a DHS assistant general counsel stating that DHS would permit OPUBCO to review the documents if the order were vacated, the Tenth Circuit concluded that lifting the protective order would not result in OPUBCO having access to the discovery documents. *Id.* at 1425 (App. 7a). Additionally, the court concluded that the interest which OPUBCO sought to vindicate in seeking to vacate the protective order was not within the zone of interests protected by the First Amendment—concluding that the press had no special right of access to discovery materials. *Id.* (App. at 8a). OPUBCO timely filed a petition for rehearing and suggestion for rehearing *en banc*. The petition and sugges-

tion were denied without opinion on January 31, 1985 (App. 10a). The return of the documents to the Hospitals has been stayed pending action by this Court. Order (Jan. 31, 1984), *OHA v. DHS*.

REASONS FOR GRANTING THE WRIT

The importance of this case rests in the nature of the documents OPUBCO and the public are forbidden to see. These documents contain cost information that may reveal whether certain of the Hospitals' Medicaid cost reports were inflated or whether public officials breached their duties in agreeing to pay public funds to the Hospitals at rates exceeding efficient and "reasonable" costs. 42 U.S.C. § 1396(a)(13)(A).

The protective orders in the underlying litigation prevent the parties from allowing the press or public to view these important documents and forbid the parties from discussing information contained in them. Allegations of fraud in the use of public funds cannot be investigated while the orders are in place, and the public therefore remains uninformed about the legitimacy of the Hospitals' claims and the actions of DHS officials.

DHS determines the rate of Medicaid reimbursement it pays by, in part, relying on cost reports submitted by the Hospitals. The cost reports are summaries of those costs which the Hospitals believe support their claims for reimbursements. The protected discovery documents are those the Hospitals used to prepare the costs reports, *i.e.*, the proof or evidence relied on by the Hospitals to seek public funds. As characterized by a DHS attorney, "These documents are the underlying documents for the Medicare and Medicaid cost reports that were at issue in this case." Hearing Transcript at 34. Without reviewing these documents, the press and the public cannot assess the validity of the Hospitals' claims for Medicaid reimbursement or evaluate whether DHS acted in the public interest when it adopted the new methodology or settled this case.

This case presents two questions of law which warrant review by this Court. First, the court below simply was wrong in holding that OPUBCO did not have standing to challenge the protective order. This Court and other courts of appeals have permitted the news media, representing the public, to challenge protective orders which sealed documents, closed judicial proceedings or ordered certain persons not to discuss information gained during the course of litigation. The Tenth Circuit's decision, then, is in conflict with decisions of this Court and creates a conflict among the circuits. It represents a clear deviation from the principle established by this Court that the press can challenge orders which prevent the public from learning of judicial proceedings. Since OPUBCO's standing was the sole ground for the Tenth Circuit's decision, its holding should be reversed on this basis alone.

Second, the Tenth Circuit apparently read this Court's decision in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984), as permitting courts to prevent public access to pretrial discovery documents under all circumstances. *Rhinehart* does not stand for this, but only for the proposition that if "good cause" first is shown for issuing a protective order under Fed. R. Civ. P. 26(c), no additional right of access can be grounded in the First Amendment. The court of appeals erred in not reaching the question of whether "good cause" was shown for initially entering or later continuing the protective order in question here. Because the trial court did not consider the "good cause" standard, and ignored the First Amendment and public interest implications of the order, the protective order violated Fed. R. Civ. P. 26(c) and should have been vacated.

The decisions below, if allowed to stand, are important in that not only do they forever prevent public examination of what appears to be flagrant misuse of public funds, but in a startling departure from this Court's

holdings, will drastically reduce access by the media, and through them the public, to judicial proceedings. The decisions under review permit courts to entirely ignore on standing grounds any claim by a nonparty that an order closing a proceeding or otherwise restricting access is improper, and further takes a proceeding—civil discovery—which for almost 50 years has been presumptively open to public examination, and allows it closed upon no more than a conclusory request. The effect of these rulings inevitably will lessen the "uninhibited, robust, and wide-open" debate on public issues that is at the heart of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

I. The Tenth Circuit's Holding That OPUBCO Lacked Standing to Challenge the Protective Orders Is in Conflict with Decisions of This Court and Other Courts of Appeals

It was plain error for the Tenth Court to hold that OPUBCO lacked standing to challenge the protective orders at issue. This Court repeatedly has recognized the proper role of the press in asserting a First Amendment objection to restrictions on public information, not based on the interests of the press itself, but on vindication of the public's First Amendment interests.

For example, in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the three national commercial broadcast television networks and other media organizations asked to copy portions of audio tapes played during a criminal trial stemming from the Watergate break-in. This Court did not question the press' standing to seek access to these judicial materials, but ruled only that the Presidential Recordings Act, 44 U.S.C. § 2107, did not permit such copying. Similarly, this Court has accepted the media's standing to object to orders restricting the press' and the public's right of access to judicial proceedings. In *Press-Enterprise Co. v.*

Superior Court, 464 U.S. 501 (1984), a newspaper petitioned for a writ of mandamus to compel the release of a transcript of voire dire proceedings in a criminal trial. This Court ruled, implicitly granting the newspaper's standing, that voir dire examinations are presumptively open. This Court also implicitly recognized the press' standing to challenge the closure of a trial, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and a pretrial hearing. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). In each of these cases, the petitioner newspapers were not parties to the underlying action and often appeared to challenge a trial court's order after it had been granted. Nonetheless, this Court ruled on the merits of the challenges. In the instant case, however, the Tenth Circuit refused to reach the merits and instead found OPUBCO without standing to object to the orders. This is in direct conflict with the stance of this Court.

The Tenth Circuit's decision also is in conflict with other courts of appeals which have permitted challenges to closure or protective orders by media representatives who were not parties to the underlying action. Courts of appeals may have disagreed on the form the case must take on appeal to challenge a lower court's order.[11] However, at least eight circuits—the First, Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth—have held that media representatives who were not parties to an action

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[11] Some courts of appeals have implicitly recognized the right of media representatives to bring such challenges. *See, e.g., In re* San Juan Star Co., 662 F.2d 108 (1st Cir. 1981); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981). Others have held that the media first must intervene in the underlying action. *See, e.g.*, United States v. Criden,, 675 F.2d 550 (3d Cir. 1982). Some require media representatives who are not parties to the underlying action to challenge closure or protective orders only by petitioning for writs of prohibition or mandamus. *See, e.g.*, United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982).

had standing to argue that certain judicial documents should be made public.[12] OPUBCO's appeal of the district court's refusal to vacate the protective orders was consistent with these cases, in none of which was there an objection to the news media's standing.

The Tenth Circuit chose to overlook this body of precedent making clear that the news media, representing the public, have the right to challenge protective orders. It also ignored the district court's apparent acceptance of OPUBCO's standing.[13] Further, counsel for the Hospitals conceded OPUBCO's standing in the district court.[14]

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[12] *See, e.g., In re* Coordinated Pre-Trial Proceedings, —— F.2d ——, 10 Med. L. Rptr. 2430 (9th Cir.), *cert. denied,* 105 S. Ct. 768 (1984) (newspapers granted writ ordering trial court to lift stay delaying declassification of pre-trial documents); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (newspaper challenged trial court rulings closing pre-trial hearing, sealing transcript and ordering counsel not to reveal "confidential" information); *In re* Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) (newspapers moved to have document used in liitgation made available to public); *In re* Knoxville News-Sentinel, 723 F.2d 470 (6th Cir. 1983) (newspaper motion to vacate order allowing party in underlying action to remove exhibits); *In re* Iowa Freedom of Information Council, 724 F.2d 658 (8th Cir. 1983) (reporters sought writ of mandamus to order district court to release transcript of contempt hearing); *In re* San Juan Star Co., 662 F.2d 108 (newspaper challenged trial court's order forbidding attorneys in civil rights suit from disclosing evidence obtained through depositions); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (reporters sought permission to copy audio tapes used at trial); Application of National Broadcasting Co., Inc., 635 F.2d 945 (2d Cir. 1980) (television network sought access to videotapes used in criminal trial).

[13] The Order denying the relief OPUBCO sought did not question OPUBCO's standing. Order (Jan. 27, 1984), *OHA v. DHS* (App. 11a).

[14] *See, e.g.,* Hearing Transcript at 10, *OHA v. DHS* ("We don't contest their [OPUBCO's] standing to be in this courtroom today. We think there are sufficient cases that that question is moot.").

Instead, the court below applied the test for standing found in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464. There, this Court noted that it is not sufficient for a party to request "a court of the United States to declare [the party's] legal rights." *Id.* at 471. Rather, the litigant must "have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Id.* Standing requires "at an irreducible minimum" that the party " 'show that he personally has suffered some actual or threatened injury' . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision' . . . ." *Id.* at 472 (citations omitted). The Tenth Circuit erred in finding that OPUBCO did not meet the test, assuming *arguendo* that it is applicable here.

The court of appeals conceded that OPUBCO complied with the "injury in fact" prong of the test, but ruled that OPUBCO's injury could not be redressed by a favorable decision and thus that the second part of the test was not met.[15] To the contrary, the record indicates that in the absence of the protective orders DHS would allow OPUBCO access to the pertinent documents.

In its brief to the Tenth Circuit, OPUBCO emphasized that "representatives of DHS told reporters for *The Daily Oklahoman* that only the protective orders prevent the agency from revealing the documents produced by the Hospitals to the journalists." Brief of Appellant at

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[15] The Tenth Circuit did not have this Court's guidance in applying that portion of the *Valley Forge* test on which the court of appeals focused, *i.e.*, whether OPUBCO's injury is likely to be redressed by a favorable decision. Since this Court found that the plaintiffs in *Valley Forge* failed to identify any personal injury, the Court did not need to apply the second prong of the test to the facts before it. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. at 477.

4. The Hospitals did not dispute that this was DHS's intention.[16]

Contrary to the Court of Appeals' findings, OPUBCO did not ask for adjudication of "abstract questions" or "generalized grievances." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). It showed a " 'distinct and palpable injury' . . . that is likely to be redressed if the requested relief is granted." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. at 501). The record offers no basis to doubt that vacating the protective orders would permit OPUBCO to review the documents in question and allow the parties in the district court to discuss the documents with OPUBCO. Thus, both prongs of the *Valley Forge* test are met, confirming OPUBCO's standing to challenge the orders.[17]

The court of appeals' decision on standing, therefore, is entirely at odds with decisions of this Court and every court of appeals which has considered the question. If allowed to stand, the ability of the press to vindicate the First Amendment rights of the public in access to judicial proceedings, which often, like this case, involve issues of overwhelming public importance, will be virtually defeated.

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[16] To remove any doubt concerning DHS's intention to release the discovery documents if the protective orders were vacated, OPUBCO submitted with its Petition for Rehearing an affidavit from the Assistant General Counsel to the Department of Human Services for the State of Oklahoma who is the custodian of the discovery documents. This affidavit stated that, if the bar of the protective orders were lifted, DHS would permit OPUBCO access to the documents. App. 22a.

[17] Other aspects of the court of appeals' decision, in particular its improper interpretation of *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984), are addressed in Argument II, *infra*.

II. The Decisions Below, in Refusing to Vacate a Protective Order Despite the Absence of a "Good Cause" Showing, Conflict with Decisions of This Court and Other Courts of Appeals and Violate the Federal Rules of Civil Procedure

The Tenth Circuit's decision—erroneously finding that OPUBCO lacked standing to challenge a protective order and disregarding the trial court's abuse of its discretion in issuing and maintaining a protective order without "good cause shown"—is in direct conflict with decisions of this Court and other courts of appeals and in violation of the Federal Rules of Civil Procedure. If allowed to stand, the decision will permit district courts in the six states of the Tenth Circuit, and others which adopt the precedent, to enter Rule 26(c) protective orders without satisfying the rule itself. A party's mere assertion of "confidentiality"—and the district court here based its order on nothing more—will be sufficient to seal all discovery documents and prohibit parties from discussing them. Even in cases of significant public interest, as is the instant case, the public will remain uninformed of all information elicited during discovery except for that used in open court.

The Federal Rules do not condone this, and, as shown by *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, neither does this Court. The plain meaning of the Federal Rules of Civil Procedure is that the discovery process is presumptively open. The norm under Rule 26 is that disclosure is permitted; the exception, requiring judicial action, is a protective order. Accordingly, the Seventh Circuit concluded that, "As a general proposition, pretrial discovery must take place in the public unless *compelling reasons* exist for denying the public access to the proceedings." *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979) (emphasis added). Further, subdivision (d) was added to Rule 5 in 1980 specifically to protect the rights of nonparties to have access to "deposi-

tions . . . . interrogatories, requests for documents, requests for admission, and answers and responses thereto . . . ." Fed. R. Civ. P. 5(d).[18] Initially, the Advisory Committee suggested that, due to storage costs, discovery materials not be filed unless so ordered by the court or for use in open proceedings. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613, 622-23 (1978). Despite its recommendation that discovery materials normally not be filed, the Committee appended a note making clear that nonparties still were to have access to the materials:

> "This amendment and amendments to the discovery rules permit the materials described to be retained by the parties unless and until they are used for some purpose in the action. But any party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provision of Rule 26(c)." *Id.*

However, following complaints by the press and others "about the 'unconscionable burden' of obliging them to secure a court order for access," the Advisory Committee instead recommended the current Rule 5(d). Amendments to Rules, 85 F.R.D. 521, 540 (1980). The subsection now presumes that material served on parties will be filed and open to the public. The Advisory Committee note to the 1980 amendment recognizes that sometimes

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[18] Fed. R. Civ. P. 5(d) states:

> "All paper after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and response thereto not be filed unless on order of the court or for use in the proceeding."

no use is made of discovery materials, "[b]ut such materials are sometimes of interest to those who may have no access to them . . . such as members of a class, litigants similarly situated, or *the public generally.*" Fed. R. Civ. P. 5(d) advisory committee note (1980) (emphasis added). Even the rejected Rule 5(d) recognized a right of access for nonparties to discovery materials.

Similarly, Rule 30(f)(1) requires that depositions be "promptly file[d] . . . with the court in which the action is pending" unless otherwise ordered by the court. This filing requirement was added to Rule 30 in 1980, and the advisory committee note refers to the note to Rule 5(d) as an explanation of the amended provision. Together, the Federal Rules of Civil Procedure and the advisory committee notes show that discovery proceedings are presumptively open, for the purpose of allowing access by nonparties such as OPUBCO here.

The district court, however, took the opposite approach. Neither the Hospital nor DHS showed good cause with particularity, as this Court has required under Rule 26(c):

> "To establish 'good cause' for a protective order under [Fed. R. Civ. P.] 26(c), [t]he courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements . . . .'" *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (quoting *In re Halkin*, 598 F.2d 176, 193 (D.C. Cir. 1979)).

Despite this, the district court issued the requested orders, although the sole reason even suggested by the parties' motions was the general and conclusory statement that the documents at issue were "confidential." Plaintiffs' Combined Response to Defendants' First Request for Protective Order; and Plaintiffs' Brief in Support of the Foregoing at 6, *OHA v. DHS*.

Other than this bald assertion of confidentiality, the court had no information before it that explained why

protection from public access was necessary.[19] Even given two additional opportunities to specify the reasons for needing a protective order, the Hospitals failed to do so. In their brief opposing OPUBCO's motion to vacate the orders, the Hospitals referred only to "the confidential status of the documents and records exchanged." Hospital Brief at 2, *OHA v. DHS*. In the argument before the district court on OPUBCO's motion, the Hospitals again merely asserted confidentiality while also suggesting that some documents might be privileged. Hearing Transcript at 15.[20]

The district court's general conclusion that the materials were confidential by itself is insufficient to support a protective order. *See, e.g., Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich 1981). Further, although the Hospitals never explained the nature of their claim of confidentiality, there is no reason to believe that the materials involved would support the entry of a broad protective order.

First, courts have held that corporate entities, such as the individual hospitals, have no generalized privacy ex-

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[19] Additionally, at oral argument before the district court, the Hospitals indicated for the first time that an underlying reason for the orders was to expedite beginning the trial. Hearing Transcript at 20. Whatever validity that suggestion might have had when the order was entered, it had none by the time the district court considered OPUBCO's motion to vacate, since the underlying case had by then been settled.

[20] Apparently responding to this claim, in denying OPUBCO's motion to vacate the protective orders, the trial court suggested that the orders may have been entered in part because some "documents were subject to various privileges." Order (Jan. 27, 1984), at 2, *OHA v. DHS* (App. 12a). However, the Hospitals did screen the material before making copies for DHS, removing numerous documents in the process. Hearing Transcript at 15. Further, the protective order set forth a procedure for allowing the district court to rule on disputed claims of privilege. As noted, *see supra* note 8, the parties used this procedure at least once. It must be presumed, therefore, that none of the documents actually produced were subject to a claim of privilege.

pectations. To the degree the district court read the Hospitals' claim of "confidentiality" as an interest in keeping their business practices from public view, the decisions are in conflict with other courts. For example, the Sixth Circuit has stressed that "showing that the information [in discovery documents for which a protective order was requested] would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1595 (1984). A district court hearing a complex antitrust case refused to issue a protective order to cover material which alleged that companies had engaged in price fixing and which discussed the companies' analysis of how government regulations would affect the prices and supply of their products, concluding that this material, although doubtless confidential, was not subject to the expectations of privacy which has to be established for "good cause" to be shown. *In re Coordinated Pre-Trial Proceedings*, 101 F.R.D. 34 (C.D. Cal. 1984).

Additionally, in the Medicare program, hospitals and nursing homes providing services similar to those provided by the Hospitals to the Oklahoma Medicaid program are required to file cost reports with insurance companies which act as intermediaries for the Department of Health and Human Services. 42 U.S.C. § 1395g; 42 C.F.R. § 405.453. Medicare regulations require that cost reports be made available to the public on written request. 20 C.F.R. § 422.435. Since these reports contain "detailed financial information," providers have contended "that release of the cost reports would likely cause substantial harm to [their] competitive positions . . . ." *Humana of Virginia v. Blue Cross of Virginia*, 622 F.2d 76, 78-79 (4th Cir. 1980). Despite such contentions, courts have held that release is not prohibited by the Trade Secrets Act, 18 U.S.C. § 1905. *See, e.g., Parkridge*

Hospital v. Califano, 625 F.2d 719 (6th Cir. 1980). While the documents at issue in the instant case are the underlying documents for the cost reports, rather than the cost reports themselves, the cited cases show that participation in government medical programs provides no expectation of avoiding public knowledge of health care providers' operations. This was emphasized by the Oklahoma Supreme Court, which found that cost reports and audits are not exempt from the Oklahoma Open Records Law:

> "Those who voluntarily choose to participate in a program which is primarily supported by tax dollars cannot reasonably expect the public which funds the program will be denied the right to scrutinize the basis on which the payments are made." *Tulsa Tribune Co. v. Oklahoma State Nursing Home Ass'n*, 55 Okla. B.J. 1358, 1359 (Okla. Sup. Ct. June 26, 1984).

The discovery documents supplied by the Hospitals, therefore, could not be hidden behind the shield of "confidentiality" on the amorphous basis of protecting business interests. Nor could the Hospitals validly have argued that individual privacy interests were at stake, since the Hospitals appear to already have excised all privileged material which might contain confidential information about individuals. *See supra* note 20.[21]

Even if it were alleged that the documents contain trade secrets, *e.g.*, the methodology by which the Hospitals set their service charges (a claim not raised by the Hospitals), this also would be, without more, an insufficient basis for granting a protective order under Rule 26(c). "The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the

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[21] Even if certain individual names remain in the discovery documents, that information could be redacted.

need for disclosure." Fed. R. Civ. P. 26 advisory committee note (1983); *see, e.g., Convey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

Thus, a generalized concern about confidentiality—whether concerning individual privacy or protection of alleged trade secrets—does not specify a harm sufficient to justify broad protective orders. The Hospitals were obligated to show with particularly that the discovery materials contained trade secrets or other confidential business information and "that disclosure . . . [would] work a clearly defined and very serious injury to [their] business[es]." *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975). In not doing so, the Hospitals failed to show the "good cause" required for issuing a protective order.

Moreover, even had the parties supplied some basis for a protective order, a trial court must fully explicate its reasons for denying public access. *See Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970). Here, however, the district court's orders merely refer to "the confidential nature of the records," failing to explain why they were confidential or to support this assertion. Protective Order (Sept. 26, 1983), at 3; Protective Order (Sept. 9, 1983), at 5, *OHA v. DHS*. Indeed, the district court did not even review the documents. It simply accepted the conclusory claim of confidentiality which was made to it. This was insufficient since, as the Eighth Circuit has pointed out, courts ordinarily "should not take representations of interested counsel on faith" when a party moves for a protective order. *In re Iowa Freedom of Information Council*, 724 F.2d at 663.

Because of the lack of specificity of harm to the parties in the absence of protective orders, the instant case is not analogous to *Seattle Times Co. v. Rhinehart*, 104 S.

Ct. 2199, relied upon in part the Tenth Circuit.[22] The predicate of the *Rhinehart* decision was that the state trial court had established the existence of "good cause" for issuing a protective order under Rule 26(c). Thus, *Rhinehart* "does not dictate a result . . . unless [it is] determine[d] whether there was good cause for a protective order under Rule 26(c)." *Tavoulareas v. The Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984).

The *Rhinehart* trial court had first refused to issue an order protecting pre-trial discovery documents because "the facts alleged by [movant Rhinehart and his religious group] . . . were too conclusory to warrant a finding of 'good cause.'" *Seattle Times Co. v. Rhinehart*, 104 S. Ct. at 2204. It was not until the movants submitted "detailed" affidavits offering extensive support for the need for a protective order that the court entered a narrowly focused order. *Id.* The movants described letters and telephone calls threatening physical harm to those associated with the religious group, and "incidents at the group's headquarters involving attacks, and assaults" directed at the group and its members. *Id.* Only after such a persuasive showing did the *Rinehart* trial court find the "good cause" necessary for issuing a protective order.

In *Rhinehart*, this Court held that there was no special First Amendment interest in pre-trial discovery documents once a valid protective order was issued, a predicate not met in this case. However, this Court made clear that the impact on First Amendment rights is an essential element of a good cause finding, and is one factor to be balanced in determining if a valid protective order may be issued. Writing for a unanimous Court, Justice Powell stressed that "it is important to recognize

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[22] This case also differs from *Rhinehart* in its impact on the public interest. The underlying action in *Rhinehart* involved two private parties litigating a libel suit. Here, a state agency has agreed to pay $8 million in public funds to settle the underlying litigation. The public interest thus is significantly more affected in this case than in *Rhinehart*.

the extent of the impairment of First Amendment rights that a protective order may cause." *Id.* at 2207. In concurrence, Justice Brennan emphasized this by observing that "the Court today recognizes that pretrial protective orders . . . are subject to scrutiny under the First Amendment." *Id.* at 2210 (Brennan, J., concurring).

The Tenth Circuit's decision, therefore, conflicts with *Rhinehart* by essentially reading out both the requirement of "good cause" and its integral requirement that First Amendment considerations be weighed, which were the foundations of the *Rhinehart* ruling. The decision below also is in conflict with the Ninth Circuit's reading of *Rhinehart.* In *In re Coordinated Pre-Trial Proceedings,* —— F.2d at ——, 10 Med. L. Rptr. at 2430, decided after *Rhineart,* the Ninth Circuit found that the "public and the press have the right to inspect public records and documents, including pretrial judicial records and documents," a right "grounded in both the common law and the first amendment," which must be balanced against conflicting governmental interests.

The district court in the instant case did not balance First Amendment concerns against interests in preventing abuse of the court's processes. *See Seattle Times Co. v. Rhinehart,* 104 S. Ct. at 2207-08. It did not consider the public nature of the questions raised in the Hospitals' litigation. It did not engage in "a careful weighing of competing factors." *Gulf Oil Co. v. Bernard,* 452 U.S. at 102. It did no balancing at all.

Courts do have discretion under Rule 26(c) to issue protective orders. *See Seattle Times Co. v. Rhinehart,* 104 S. Ct. at 2209. However, "the power to exercise 'discretion' does not imply that discretionary powers can be exercised without restraint." *In re Knoxville News-Sentinel,* 723 F.2d at 473. A district court's decision to enter a Rule 26(c) order is "not insulated from review merely because the judge has discretion in this domain." *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d at 1177. Here, the trial court abused its discretion by not

making any effort to weigh the factors and make a reasoned judgment. The Tenth Circuit understood *Rhinehart* as permitting such a result, a reading this Court did not intend and should not let stand.

In *Rhinehart*, this Court carefully balanced valid needs for protection during discovery with the long-established presumption that discovery normally is an open process. The decisions here drastically alter that balance, relying on *Rhinehart* instead to foreclose public access on the flimsiest of grounds. The effect of this case, if not reversed, will be that parties to litigation may keep materials hidden from public view essentially on demand, despite the fact that the matters hidden may involve, as here, expenditures of millions of dollars of public funds. This result could not possibly have been intended by the *Rhinehart* Court, and this Court should accept review of this case to correct the Tenth Circuit's dangerous misinterpretation.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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May 1, 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-1171

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

v.

OKLAHOMA PUBLISHING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-83-1274-BT)

[Filed Nov. 27, 1984]

Michael Minnis of Pierson, Ball & Dowd, Oklahoma City, Oklahoma (Jack N. Goodman and Robert Trager of Pierson, Ball & Dowd, Washington, D.C., with him on the brief), for Appellant.

William C. Anderson (G. Michael Lewis and Leonard I. Pataki with him on the brief) of Doerner, Stuart, Saunders, Daniel & Anderson, Tulsa, Oklahoma (Michael H. Cook, Douglas J. Colton, and Debbi M. Johnstone of Wood, Lucksinger & Epstein, Washington, D.C., with him

on the brief), for Appellee Oklahoma Hospital Association.

Before HOLLOWAY, Chief Judge, BARRETT, and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

Appellant, The Oklahoma Publishing Company (OPUBCO), appeals a district court's ruling refusing to vacate protective orders entered in a civil action styled *Oklahoma Hospital Association v. Oklahoma Department of Human Services*, bearing case number CIV-83-1274-BT. We will dismiss the appeal due to OPUBCO's lack of standing.

Background

In 1983 the Oklahoma Department of Human Services (DHS) changed the methodology by which it reimburses hospitals for inpatient hospital services provided to Medicaid beneficiaries under the Oklahoma Hospital Assistance Program. On May 10, 1984, the Oklahoma Hospital Association (OHA) brought an action against DHS challenging the new methodology and seeking an order requiring DHS to use a different reimbursement formula. OHA thereafter filed a motion for class certification; on July 5, 1983, the district court certified a plaintiff class comprised of some 120 hospitals. Noting that Eleventh Amendment concerns (prohibiting the awarding of retroactive monetary damages absent the State's waiver of its sovereign immunity) necessitated speedy resolution of the dispute, R. Vol. I at 252, the trial court set the final cutoff for discovery on September 21, 1983, with trial to commence on October 11, 1983. R. Vol. III at 702-03. In light of the expedited discovery completion date and trial

date, DHS filed motions to shorten the time for OHA to respond to its interrogatories and to its request for production of documents, and to shorten the time of "reasonable notice" under Rule 30(b)(1), Fed. R. Civ. P., for the taking of depositions. R. Vol. IV at 798. Following OHA's combined response to these motions but before the trial court had ruled on them, the parties agreed upon terms for reciprocal protective orders covering documents produced during discovery. *Id.* at 840.

According to the terms of the protective orders, the party seeking production of documents would first designate which classes of documents it wished to inspect. *Id.* The opposing party then would set aside the designated documents it claimed were privileged. *Id.* If the party seeking production disputed the claim of privilege and the parties could not resolve the dispute between themselves, the dispute was to be presented to the court for an *in camera* inspection of the claimed privileged documents. *Id.* at 841. Once documents were delivered to a party, access to those documents was limited to the parties' management-level employees, counsel, auditors, and expert witnesses, who were all required to keep the contents of the documents confidential. *Id.* at 842. This confidential status was to be maintained throughout the action, except with regard to documents introduced in open court. *Id.* All documents not introduced were, upon completion of the litigation, either to be returned to the party who produced them or destroyed. *Id.* at 842-43. The district court incorporated these stipulations into two protective orders—one covering documents produced by OHA, the other covering documents produced by DHS—which it issued pursuant to Rule 26(c), Fed. R. Civ. P. *Id.* at 839, 856. According to the district court, these protective orders were necessary because: (1) the discovery encompassed hundreds of thousands of documents, many of which were subject to various claims of privilege, and (2) the parties could not otherwise review requested doc-

uments, assert claimed privileges, and then produce remaining documents in time to meet the expedited trial date. (Order No. CIV-83-1274, Western District of Oklahoma, January 27, 1984, at 2.)

Following entry of the protective orders but before trial on the merits, the parties sought court approval of a Stipulated Settlement Agreement regarding the reimbursement methodology. A hearing on the proposed agreement was scheduled for December 15, 1983. On December 12, 1983, OPUBCO, who was not a party in the case, filed a motion to vacate the protective orders and sought an order "directing the parties to allow the public (including [OPUBCO]) access to all documents produced pursuant to discovery in this litigation." R. Vol. V at 1049. OPUBCO argued that the district court abused its discretion in granting the protective orders by not balancing "the interests to be protected against the historical and constitutionally-protected interest in open-court proceedings and the specific public interest in the items protected." R. Vol. V at 1054. OPUBCO's motion was opposed by OHA, but was neither opposed nor supported by DHS. On January 27, 1984, the district court denied OPUBCO's motion and ordered the return or destruction of the documents. On February 1, 1984, the court granted OPUBCO's motion to stay execution of that order for the purposes of this appeal.

II.

Discussion

During oral argument of this appeal, counsel for OPUBCO was asked upon what basis OPUBCO claimed standing to challenge the district court's imposition of protective orders in the underlying suit. Because standing is "a threshold requirement which empowers a federal court to adjudicate a dispute," *Hinkson v. Pfleiderer*, 729 F.2d 697, 700 (10th Cir. 1984), we cannot reach the merits of the case unless OPUBCO first demonstrates

that a "case or controversy" exists between it and OHA which is proper for judicial resolution. *Glover River Organization v. U.S. Dept. of Interior*, 675 F.2d 251, 253 (10th Cir. 1982).

OPUBCO's claim of standing is predicated on its alleged First Amendment right to gather information. R. Vol. V at 1054-55. OHA did not, in the district court, contest OPUBCO's standing insofar as OPUBCO sought to vindicate its own First Amendment rights. OHA did, however, contest OPUBCO's standing insofar as it attempted to assert the constitutional rights of the parties to the underlying suit. *Id.* at 1192. The district court in its order did not discuss OPUBCO's standing, except in noting that, as a nonparty, OPUBCO had no standing to assert the parties' First Amendment rights. (Order No. CIV-83-1274-BT, Western District of Oklahoma, January 27, 1984, at 5.)

The requirements for standing under Article III, Section 2, of the United States Constitution were recently clarified by the Supreme Court:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant" and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." (Citations omitted.)

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982), *quoted in Hinkson, supra*, 729 F.2d at 700. Beyond these "constitutional requirements," *Id.* at 474, the Court has also adhered to certain prudential principles, including the principle that a plaintiff cannot base his claim to relief on the legal rights of third parties, *Warth v. Seldin*, 422 U.S. 490, 499 (1975), and the principle

that a plaintiff's alleged injury must "arguably" fall within "the zone of interests to be protected or regulated by the statute or Constitutional guarantee in question." *Association of Data Processing Orgs. v. Camp*, 397 U.S. 150, 153 (1970). *Cf. Valley Forge, supra*, 454 U.S. at 474-475 (recognizing the continuing importance of prudential considerations).

OPUBCO, in its Motion to Appear Specially, alleged that were it not for the protective orders, the parties would be free to disseminate, and it would thereby be free to gather and publish, discovery documents not subject to those orders. This, we believe, is a sufficient allegation of injury in fact to satisfy the first requirement for standing under *Valley Forge*. Injury in fact, however, is not the sole constitutional requirement. We also must consider whether OPUBCO's alleged injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." The challenged action here is the district court's imposition of protective orders. In its Motion to Appear Specially, as noted earlier, OPUBCO moved to vacate the protective order and sought an order "directing the parties to allow the public (including [OPUBCO]) access to all documents produced pursuant to discovery in this litigation." R. Vol. V at 1049. OPUBCO's contention that it is merely seeking removal of "barriers to normal access," Reply Brief of Appellant at 16, is thus without merit. OPUBCO's alleged injury is that it was denied access to documents covered by the protective orders. We therefore must consider whether by vacating those protective orders OPUBCO will gain access to those documents.

While it may be conceded that parties to litigation have a constitutionally protected right to disseminate information obtained by them through the discovery process absent a valid protective order, *See Seattle Times Co. v. Rhinehart*, —— U.S. ——, 52 U.S.L.W. 4612 (No. 82-1721, May 21, 1984), it does not follow that they can be

compelled to disseminate such information. The Supreme Court recognized this proposition in *Wooley v. Maynard*, 430 U.S. 705, 714 (1976), when it noted "that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). This proposition applies with equal force notwithstanding that the parties to the underlying suit are an association and a state agency. *Consolidated Edison Co. v. Public Serv. Comm.*, 447 U.S. 530, 533 (1979) ("[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual."), *quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

Consequently, assuming we were to lift the protective orders, still the parties to the unlerlying suit cannot be compelled, ipso facto, to disseminate documents in their possession; OPUBCO, a nonparty, can gain access to those documents only by exercising a party's right to disseminate. This it cannot do. *See Warth, supra; In Re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 584 (1983) (Pratt, Circuit Judge, sitting by designation). Moreover, the protective orders were imposed by the district court following the parties' agreement and stipulation to terms and conditions for production of documents. R. Vol. IV at 840. Neither OHA nor DHS objected to or appealed from the district court's imposition of those orders. In light of the fact that the parties have not chosen to assert their rights of dissemination, we view it as highly unlikely that they would do so were we simply to lift the protective orders at this time. *Cf. Agent Orange, supra*, 96 F.R.D. at 584 ("Neither plaintiffs nor defendants have appealed from the special master's pro-

tective order, and the court concludes that CBS does not have standing to assert the parties' rights where they have not chosen to assert them at this time"). Consequently, it is unlikely that OPUBCO would succeed in obtaining the redress it seeks—access to the documents—were we to lift the protective orders. We therefore conclude that OPUBCO has failed to satisfy the second constitutional requirement for standing under *Valley Forge.*

Even if we were to assume, as OPUBCO contends, that this is not an "access" case, and that mere removal of the protective order is the only redress OPUBCO seeks (thus satisfying the second *Valley Forge* constitutional requirement), we would nonetheless deny OPUBCO's standing based on the prudential concern that the interest for which it seeks redress is not within the "zone of interest to be protected or regulated by the statute or constitutional guarantee in question." The interest OPUBCO seeks to protect is its alleged First Amendment right to gather information. Although it is true that the Supreme Court has recognized that newsgathering does warrant some First Amendment protection, *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972), that right is not unlimited: "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1, 17 (1965). Thus, the Supreme Court has recognized that, whatever the extent of protection warranted newsgathering, it is no greater than the right of the general public to obtain information. *Pell v. Procunier,* 417 U.S. 817, 834 (1974) ("The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.") *Accord Branzburg v. Hayes, supra; Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978).

The Supreme Court recently stated that "pre-trial depositions and interrogatories are not public components of a civil trial." *Seattle Times, supra,* 52 U.S.L.W. at 4616. This is so, the Supreme Court recognized, because

"[m]uch of the information that surfaces during pre-trial discovery may be unrelated or only tangentially related, to the underlying cause of action." *Id.* Such is the case here. The district court entered protective orders in order to expedite a discovery process involving literally hundreds of thousands of documents, many of which were subject to claims of privilege. At that stage in the litigation, those documents had not been filed with the court and certainly had not satisfied threshold tests of relevancy and admissibility. They therefore were not available to the public generally, and OPUBCO does not have standing to complain about the existence of the protective order. *Cf. Agent Orange, supra,* 96 F.R.D. at 584 ("The same factors that support access to judicial records and other public documents . . . simply are not implicated where the materials were obtained by a party through discovery but have not been filed with the court"). Having determined that OPUBCO lacks standing to challenge the district court's imposition of protective orders, it is unnecessary for us to reach the substantive contentions.

DISMISSED.

JANUARY TERM—January 31, 1985

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

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No. 84-1171

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Plaintiffs-Appellees,

vs.

OKLAHOMA PUBLISHING COMPANY,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellant Procedure, the suggestion for rehearing en banc is denied.

Judge Seymour did not participate.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-1274-BT

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Plaintiffs,

v.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES, *et al.*,
Defendants.

[Filed Jan. 27, 1984]

ORDER

The Oklahoma Publishing Company's (OPUBCO) motion to vacate the protective orders previously entered is before the Court for decision after briefing and oral argument.

When expedited discovery of literally hundreds of thousands of documents was scheduled, the parties jointly applied to the Court for entry of protective orders. The requested protective orders were entered on September 12, 1983 relative to plaintiffs' documents and September 26, 1983 relative to defendants' documents. The movant seeks to have the protective orders vacated because of First Amendment rights in the subject matter of the action and the fact that no reasonable cause as provided in F.R. Civ.P. 26(c) was established for entry of the protective orders. Following OPUBCO's motion to vacate the subject protective orders, the principal parties, without prejudice to OPUBCO's motion, entered into a settlement of plaintiffs' claims.

OPUBCO acknowledged at the hearing on January 11, 1984, that all pleadings and evidence, both oral and documentary, offered in the record by the parties have been made available to it for its review. The parties agreed at the hearing that any discovery documents, the property of and furnished by the Department of Human Services (DHS) pursuant to the September 26, 1983 protective order, would be made available to OPUBCO for review. The documents at issue, numbering approximately one hundred thousand, are those produced by 4 of the 117 plaintiff hospitals under the protective order dated September 12, 1983. Copies of these documents at this time remain in the hands of DHS, and none have been filed in the case or offered by either party into the record.

ENTRY OF PROTECTIVE ORDERS

This case was originally set for trial on October 11, 1983. On September 2, 1983, DHS filed a request for production of documents, motion to shorten time to respond and motion for expedited discovery. Plaintiffs responded to the motions on September 8, 1983, and the Court held conferences on the motions September 8 and 9, 1983. According to counsel, hundreds of thousands of documents were encompassed by the discovery motions. Plaintiffs contended some of those documents were subject to various privileges and should not be made available to defendant. The parties agreed in light of the short time frame the plaintiffs could not review the requested documents, assert claimed privileges and produce the remaining documents before the trial date. Therefore, the parties agreed to a protective order restricting access to the documents. The expedited trial was dictated by the Eleventh Amendment considerations, preventing retroactive damages to the plaintiffs should they be entitled to relief. Under the protective order, the materials were to remain confidential, save and except any documents introduced in open court. All documents not introduced were to be returned to plaintiffs or destroyed upon completition of

the litigation (a copy of the subject protective order is attached as Exhibit "A"). A similar protective order was entered two weeks later covering documents produced by defendant DHS for plaintiffs.

Nonjury trial of the case was set for October 11, 1983. At that time, the parties announced a tentative settlement had been reached. On November 22, 1983, the parties reached a final settlement agreement, and on December 15, 1983, the Court approved the settlement following notice to the plaintiff class. OPUBCO's motion to vacate the protective orders was filed December 12, 1983.

RIGHT OF ACCESS/RIGHT TO DISSEMINATE DISCOVERY MATERIALS

OPUBCO contends it has a right of access to the discovery materials at issue under the First Amendment of the United States Constitution. It seeks an order granting OPUBCO such access.

Clearly, a party to a lawsuit who gains information through discovery may exercise its First Amendment right to disseminate that information absent a protective order. *See Leonia Amusement Corp. v. Loew's*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955); *In re Halkin*, 598 F.2d 176 (D.C.Cir. 1979). Thus, as in *In re Halkin, supra*, where a protective order is entered over the objection of a party, the Court must take into consideration the First Amendment right of that party in determining whether "good cause" exists to enter the order. *Id.* at 193.

Furthermore, OPUBCO has a constitutionally protected right of access to filed documents, court exhibits or trial proceedings, all of which are a matter of public record. *In re Application of National Broadcasting Co.*, 635 F.2d 945, 949-51 (2nd Cir. 1980). Access to discovery materials which are not a part of the public record, however, is another matter and this is the issue here presented. Discovery under the Federal Rules of Civil

Procedure is liberal, giving parties broad powers to gather information. In *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981), the court stated:

> ". . . a deponent may be obliged to reveal information that will not be admissible at trial. Unlike evidence at trial, it has not passed the strict threshold tests of relevance and admissibility, yet it has been compelled by dint of legal process. The information revealed may be irrelevant, prejudicial, or pose an undue invasion of an individual's privacy."

Id. at 115.

In *In re Agent Orange Product Liability Litigation*, 96 F.R.D. 582 (E.D.N.Y. 1983), the court dealt with a request by a nonparty for access to discovery materials. In denying the request, the court stated:

> "The same factors that support a right of access to judicial records and other public documents—the public's right to know and the public interest in insuring that judicial proceedings are conducted fairly, to name but two—simply are not implicated where the materials were obtained by a party through discovery but have not yet been filed with the courts."

Id. at 584.

The Court acknowledges some of the materials sought may be a matter of public interest as the lawsuit involves the expenditure of large sums of public funds. However, none of the materials sought by OPUBCO are part of the public record. Moreover, the parties to this action agreed and stipulated to the protective order and have not chosen to assert their First Amendment right to disseminate information they have obtained.[1] OPUBCO, as a nonparty, has no standing to assert the First Amendment rights of the parties. *Barrows v. Jackson*, 346 U.S. 249, 255

[1] The plaintiffs oppose the motion to vacate the protective orders and defendant DHS has taken no position on the motion.

(1953); *In re Agent Orange Product Liability Litigation, supra,* at 584. This ruling in no way prevents OPUBCO from reporting on the litigation at issue, or obtaining the same material from other, independent sources. *Id.* It is pertinent to note the right to speak and publish does not carry with it the unrestrained right to gather information. *See Zemel v. Ruck,* 381 U.S. 1, 17 (1965); *Pell v. Procunier,* 417 U.S. 817, 833-34 (1974).

Just as the parties have a right to disseminate discovery information absent a protective order, they have a right not to disseminate such information, for "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714 (1977). Thus, this Court cannot compel the parties to release information contained in the discovery materials to OPUBCO.

The request of OPUBCO to be granted access to subject discovery documents is denied, but the protective orders are to be vacated as hereafter provided. Any party, including OPUBCO, shall have until February 3, 1984, to file a motion to stay the effect of this order pending appeal. If, by that date, no motion to stay has been filed, the parties are to return *all* copies of any documents covered by the protective orders of September 12, 1983, and September 26, 1983, by February 10, 1984. The expense of exchanging the documents are to be born by the owner of the originals. The protective orders shall thereafter expire on February 13, 1984.

ENTERED this 25th day of January, 1984.

/s/ Thomas R. Brett
THOMAS R. BRETT
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-1274-BT

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Plaintiffs,

vs.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES, *et al.*,
Defendants.

[Filed Sept. 9, 1983]

PROTECTIVE ORDER

Defendants filed their First Request for Production of Documents, Motion to Shorten Time to Respond, and Motion for Expedited Discovery herein on Friday, September 2, 1983. Copies were served by regular mail on counsel for Plaintiffs, and received by them on September 6, 1983. Counsel for Plaintiffs had no prior notice of the filing of these Motions. Plaintiffs served their Response to said Motion, together with Motion for Protective Order, by hand delivery to counsel for Defendants on September 8, 1983. The Court has held conferences with counsel for the parties on September 8 and 9, 1983, concerning said Motions.

With respect to Category V of the Defendants' First Request for Production of Documents, Plaintiffs do not object to production. Plaintiffs are therefore directed to produce said documents on September 14, 1983, at the Federal Court House, in Oklahoma City, at the hearing now scheduled there for 8:00 A.M.

With respect to categories I through IV of the Defendants' First Request, Plaintiffs have made and preserved objections based on relevance and burdensomeness. However, in order to expedite discovery, so that trial may go forward as now scheduled, Plaintiffs are prepared to agree to production of documents covered by categories I through IV of the Defendants' First Request pursuant to the stipulated terms as hereinafter set forth and ordered.

At the direction of the Court, the parties have conferenced in an effort to agree upon the terms for a Protective Order and a schedule for production. They have agreed and stipulated upon the following terms and conditions for production of documents pursuant to the Defendants' First Request, which the Court hereby approves and adopts as the Order of the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Production shall take place at the business offices of the respective hospitals, and shall exclude privileged documents.

2. No original documents shall be removed from the hospitals, except that with respect to odd-size copies for which on-site copying capability is unavailable, original documents may be removed for copying elsewhere, but must remain in the custody of a hospital employee or of counsel for Plaintiffs for the purpose of such off-site copying.

3. On arrival at the hospitals, Defendants shall designate which classes of documents set forth in categories I through IV of their First Request they wish to inspect.

4. Plaintiffs shall review said classes of documents concerning claims of privilege, and set aside any documents they claim to be privileged.

5. Defendants shall inspect the classes of documents they have designated, except for the documents set aside pursuant to a claim of privilege.

6. After inspection, Defendants shall designate which documents they desire copies of.

7. If requested, Plaintiffs shall acquaint Defendants with the general nature of any documents claimed to be privileged. If Defendants disagree as to the asserted privilege, and if the parties cannot resolve such disagreement between themselves, the disagreement shall be immediately presentd to the Court for resolution (including *in camera* inspection by the Court of the questioned documents, if appropriate).

8. Copies of the documents designated by Defendants pursuant to paragraph 6 above shall be made by or under the supervision of the hospitals or their counsel, with copies to be made and delivered to Defendants as soon as practicable after designation.

9. Defendants shall pay the actual cost incurred by each respective hospital in making copies of the designated documents, upon receipt of invoices which will be processed by DHS in the ordinary course; the parties agree that this charge is 10¢ per copy. Any commercial copying charges will be billed directly by the copying service to the party receiving the copies.

10. Production shall occur one hospital at a time, on a rotating basis, in the following sequence unless altered by agreement of the parties, commencing 8:30 A.M., September 12, 1983:

St. John Medical Center, Inc.

Hillcrest Medical Center

St. Anthony Hospital

Comanche County Memorial Hospital

St. Francis Hospital, Inc.

Oklahoma Hospital Founders, Inc.
d/b/a Oklahoma Osteopathic Hospital.

The parties will attempt to complete document discovery in one day or less at each hospital, although additional time may in some cases be required.

11. In view of the confidential nature of the records in question, any document copies delivered to Defendants, and all of the contents thereof, as well as all of the contents of any document reviewed but not copied, shall be maintained in strict confidence by the Defendants, with access thereto limited to management-level employees of Defendants, counsel for Defendants, Defendants' auditors, and Defendants' expert witnesses. All such persons having access to said copies shall be likewise bound by this Court-ordered obligation of confidentiality. Such confidential status shall be maintained continuously through the completion of this action, save and except only with respect to any such documents that are introduced in open court. All such documents not introduced, and all copies thereof, shall be returned to Plaintiffs or destroyed upon completion of the litigation. Defendants are required to identify no later than the pre-trial conference on September 27 all such documents they intend to offer at trial.

12. In producing any given document pursuant to the Defendants' First Request, Plaintiffs shall not be deemed to have waived any right to object to admission of the same in evidence on grounds of privilege, relevance or any other applicable ground; nor to have waived any right to object to further production from other members of the class.

13. Defendants have agreed to serve St. Francis Hospital, Inc. with a subpoena duces tecum covering Items I through IV of Defendants' First Request,

with service to be made upon William C. Anderson, one of the counsel for Plaintiffs. Thereupon, production by St. Francis Hospital, Inc. shall be deemed subject to the provisions of this Protective Order.

With respect to the Defendants' Motion to Expedite Discovery, the Court will take the same under advisement for the time being. However, as announced to counsel at the conference on September 8, the Court is unequivocally of the view that Defendants, and Plaintiffs for that matter, are entitled to expedited discovery as necessary in order to complete discovery within the time prescribed by the Court's Order of August 24. The Court would prefer that the parties schedule this discovery between themselves, without the intervention of the Court being required. The parties have agreed to work cooperatively in this direction, and to present to the Court only those scheduling issues which cannot be resolved by agreement. The Court has observed that the conduct of multiple discovery tasks on the same day or days may be necessary, as well as Saturday discovery work, in order to complete discovery within the allotted time. Counsel for Plaintiffs have assured the Court that they will staff discovery at as many locations as Defendants designate, so that the production of documents and taking of depositions may proceed simultaneously. The Court will remain on call to assist the parties in expediting the completion of discovery, and to make such Orders as may be necessary concerning the time and place of discovery, to make rulings on questions of privilege, and to resolve promptly any other issues which may arise.

IT IS SO ORDERED this 9th day of September, 1983.

/s/ Thomas R. Brett
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 83-1171

THE OKLAHOMA PUBLISHING COMPANY,
Appellant,

v.

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Appellees.

AFFIDAVIT OF RICHARD FREEMAN

COMES NOW the undersigned, Richard Freeman, and after being duly sworn does state under oath that:

1. I am an assistant general counsel to the Department of Human Services for the State of Oklahoma and have entered an appearance on behalf of the Oklahoma Department of Human Services in the above-styled matter.

2. This affidavit is being made solely in response to a request from the appellant for use in a petition for rehearing.

3. On behalf of the Oklahoma Department of Human Services, I have under my possession and control the documents that are the subject of the above-styled appeal, i.e. the documents produced by the appellees (Hospitals) in response to defendant's "First Request for Production of Documents" (Sept. 2, 1983) in the proceedings below.

4. The appellant has previously asked for access to these documents. Access has been denied because of the "Protective Order" (Sept. 9, 1983) entered in the case below.

5. If this "Protective Order" is vacated, the appellant will be provided with access to the documents sought.

FURTHER AFFIANT SAITH NOT.

/s/ Richard Freeman
RICHARD FREEMAN

COUNTY OF OKLAHOMA)
) ss:
STATE OF OKLAHOMA)

Subscribed and sworn to before me this 5th day of December, 1984.

/s/ Marilyn K. Gordon
Notary Public

My Commission Expires:
August 1, 1986